The Old and New Doctrines of Equality : A Critical Study of Nexus Tests and Doctrine of....

The Old and New Doctrines of Equality : A Critical Study of Nexus Tests and Doctrine of Non-Arbitrariness
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Article 14 "combines the English doctrine of the rule of law with equal protection of clause of the 14th Amendment"

"" â€" Das C.J. in Basheshar Nath v. CIT, (1959) Supp 1 SCR 528, 551.

Article 14 mandates that the State shall not deny equality before law and equal protection of laws to any person within the territory of India. By incorporating in Article 14 the British doctrine of rule of law as propounded by Prof. Dicey and the "equal protection of law" clause of 14th Amendment of the U.S. Constitution, the framers of our Constitution had in their zeal infused extra vigour and vitality in the right to equality. However, Parliament has repeatedly tried to curtail the scope and vigour of Article 14 in order to carry out the welfare programmes.1 Apart from it, the Supreme Court had sapped some of the vigour of Article 14 by showing "fanatical reverence" to the theory of classification or the nexus tests". Finally in 1974 the Supreme Court evolved the new doctrine that Article 14 is a guarantee against arbitrariness2 Thus the Supreme Court has evolved two different and distinct doctrines for tackling attack on State action on the ground of violation of Article 14. An attempt is being made in this paper to analyse objectively the merits and demerits of the old and new doctrines.

It is only understandable that our Supreme Court should have applied the theory of classification, evolved by the American Supreme Court for giving content and true meaning to right to equality. According to this doctrine "equal protection of laws" prohibits class legislation but permits reasonable classification of persons or things.3 By expressly incorporating in the second part of Article 14 the language of the 14th Amendment of the U.S. Constitution, the Constituent Assembly impliedly had approved the interpretation of that clause by the U.S. Supreme Court. Hence, from the very beginning the Indian Supreme Court has had no hesitation in applying the theory of classification while testing the Constitutional vires of legislations and State actions impugned on the basis of their being violative of Article 14. The classic nexus test was enunciated by S.R. Das, J. in the Anwar Ali Sarkar case4, thus:

"In order to pass the test of permissible classification two conditions must be fulfilled viz. (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them."

On the basis of these tests, better known as nexus tests, innumerable cases have been decided by the Supreme Court and various State High Courts. Supreme Court has from time to time tried to summarise the principles enunciated by it in its previous decisions under Article 14.5

These classic tests of permissible classification have been repeated so many times that the Supreme Court in 1960 remarked that "they now sound platitudinous".6 Apart from staleness of repetition, it was feared that the fanatical reverence shown to these tests might ultimately replace the doctrine of equality and rob Article 14 of its "glorious content".7

Some academic literature regarding the right to equality also appeared pointing out the shortcomings of the nexus tests. However, only two of such studies may be noted in this brief paper.

K.K. Mathew, J. highlighted the negative concept of the doctrine of "equality before the law", as traditionally understood and posed the question whether the command of Article 14 is merely to ban creation of equality or to eliminate inequalities ? According to him "Formal equality before the law has been found to be a sham in many areas".8 Thus, legal thinking in the country was slowly moving towards giving a positivistic or activist twist to the right to equality.

Prof. P.K. Tripathi in his Telang lectures on "Right to Equality" attempted a more comprehensive study of the right to equality. After careful analysis of several decisions of the Supreme Court applying nexus tests he concluded that these tests were inappropriate in certain fields. He pointed out that the theory of classification has three aspects which he chose to call " 'Why', 'What' and 'Whom' elements respectively." He also observed that, the nexus tests notice only the object and criterion of classification and their mutual relation but ignore the "what" element and the relationship of this element with the other two, resulting in the "what" element being confused with the other "why" or "whom" elements, specially when the "object" or "why" element is not expressly and clearly indicated in the statute itself. He further concluded that nexus tests are not suitable at all for tackling certain situations. These are: (i) where the statute indicates the policy or purpose to be fulfilled and also the special treatment to be given to selected persons or things but leaves it to the executive to make actual selection of the persons or things in fulfillment of the legislative policy; (ii) to "one person"

statutes; (iii) where legislature gives broad indication of the kind of cases to be subjected to differential treatment and (iv) to statutes which leave the executive free to pick and choose individuals towards the fulfillment of statutory policy. In short it may be stated that nexus tests were found inadequate to meet the situation where very wide or unbridled discretion was given to the authorities to pick and choose persons for giving different treatment through indicating clearly the legislative policy for achieving other objects of legislation in the statute itself. No doubt in this sphere the Supreme Court has not shown consistency even according to H.M. Seervai.9

Prof. Tripathi in the end expressed his hope that "the Supreme Court will sooner rather than later free itself from the shackles of this dogma".10

As a result of the aforesaid, well informed criticism of the nexus tests, the Supreme Court freed itself from the shackles of this dogma. However, at first in Maganlal Chaganlal v. Municipal Corpn., Greater Bombay11, the Supreme Court overruled its previous decision in Northern India Caterers Ltd. v. State of Punjab12 without applying nexus tests. Finally the Supreme Court adopted the positivistic or activist stance in E.P. Royappa v. State of Tamil Nadu.13 Bhagwati, J. stated :

"Equality is a dynamic concept with many aspects and it cannot be 'cribbed, cabined and confined' within the traditional and doctrinaire limits. From the positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies.... Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14...."

On the basis of this new activist theory of equality a few decisions14 were made by the Supreme Court and ultimately it was unanimously approved by the Supreme Court in Ajai Hasia v. Khalid Mujib.15 After reiterating that equality is a dynamic concept with many aspects which could not be confined to traditional and doctrinaire limits, Bhagwati, J. had in Maneka Gandhi proceeded to examine the 'content and reach' of the 'great equalising principle' enshrined in Article 14. He observed that:

"It is indeed the pillar on which rests securely the foundation of our democratic republic. And therefore, it must not be subject to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning, for,# to do so would be to violate its activistic magnitude.... Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally and philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

This was again reiterated by the Supreme Court in the International Airport Authority case.16

Thus the new doctrine of equality that "Article 14 embodies a guarantee against arbitrariness" has become established. However, this does not mean that the nexus tests have been abandoned by the Supreme Court altogether.

However, the new doctrine of equality has its own critics.17 Seervai has taken exception to Bhagwati, J.'s description of the classification theory as "doctrinaire" because according to him "there is nothing unpractical about a doctrine which effectively secures equal protection of law to persons by declaring the law based on impermissible classification to be void while leaving to the State a wide field for making laws based on permissible classification". He does not stop here but goes on to challenge the very validity of the new doctrine in the following terms: "The new doctrine hangs in that air because it propounds a theory of equality without reference to the terms in which Article 14 confers rights to equality." After pointing out that Article 14 has two limbs, he observes that: "Equality before law, broadly speaking, means that except in a very limited class of cases a court administering justice is not concerned with the status or position of the parties appearing before it. The law is no respecter of persons." As regards the second limb he observes that "the U.S. Supreme Court had evolved the doctrine of classification to explain and give a content to equal protection of laws."18 He has further stated that the new doctrine suffers from "fallacy of undistributed middle".19 Jagdish Swaroop has also found "it difficult to agree" with the observations of Bhagwati, J. in the Ajay Hasia case that it was for the first time in Royappa case that the Supreme Court laid bare a new dimension to Article 14 and that it was a guarantee against arbitrariness. He has pointed out that: "From the very beginning the Supreme Court held that while Article 14 forbids class legislation, it does not forbid reasonable classification." If any statute is found not to comply with the two important requirements of Article 14, it will be struck down as void and no act of the legislature could be termed "arbitrary". He further points out that: "Any order passed independent of a rule or without adequate determining principle would be arbitrary. Here the valid determining principle is valid classification. Article 14 is not really a guarantee against arbitrariness... classification would be arbitrary if it does not follow and is contrary to the norms laid down by the Supreme Court in regard to classification."20 Thus in substance the objection of Jagdish Swaroop to the new doctrine is that it fails to lay down any "determining principle for finding out whether or not a particular state action is arbitrary". In substance he agrees with H.M. Seervai that "the new doctrine hangs in the air".

It is humbly submitted that, by and large the old doctrine of classification or nexus tests is more satisfactory and must be retained because, on the basis of the old doctrine challenge to State action as being violative of Article 14 can be

successfully tackled by the courts in a large majority of cases. It is only in the limited sphere of conferment of unbridled or too wide a discretion on executive authorities to pick and choose persons or things for giving different treatment that, the doctrine of classification has not yielded satisfactory results and resulted in inconsistency in Supreme Court decisions. The new doctrine of equality, therefore, can be usefully employed in plugging this loophole. On the contrary, if the theory of classification is replaced by the new doctrine of equality viz. non arbitrariness, it would lead to highly unsatisfactory results because shorn of its rhetoric21 the new doctrine is vague and uncertain. Patanjali Sastri, C.J.'s warning may be usefully recalled here, that "dangerously wide and vague language of equality clause to the concrete facts of life, a doctrinaire approach should be avoided22". The chief merit of the new doctrine is, that it has freed the Supreme Court of the "shackles of the dogma of classification" in the limited sense that the Judges should not make sustained efforts to find some basis of classification where none is perceptible from the language of the Act. However, the new doctrine or test of non-arbitrariness does not evolve a more satisfactory test than the nexus tests. Even Prof. P.K. Tripathi, a critic of nexus tests has expressed his concern regarding the new development. He has observed that "arbitrariness by Article 14 is the arbitrariness or unreasonableness in discriminating between one person and another and if there is no discrimination, there is no arbitrariness in the sense of Article 14".23

To sum up, it is submitted that the approach of the courts should not be doctrinaire towards either of the doctrines of equality. Where a State action appears ex facie arbitrary as found in a recent case24, it should be decided on the basis of the new doctrine. Again cases pertaining to conferment of unbridled or too wide discretion on executive authorities should also be tackled on the basis of the doctrine of non-arbitrariness but other challenges to State action should still be tackled by applying the old nexus tests. It is heartening to note that Supreme Court has not totally abandoned the nexus tests25 though the new theory of non-arbitrariness has also been applied where state action has been found to be "patently" arbitrary.26

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- Constitution (First Amendment) Act, 1951 blunted the attack on the ground of violation of Article 14 for allowing smooth passage of Zamindari Abolition Acts of various States. Constitution (25th Amendment) Act introduced Article 31-C for giving overriding effect to Articles 39(a) and (b) over fundamental rights enshrined in Articles 14, 19 and 31. Later on this overriding effect was given by 42nd Amendment to all the Directive Principles over these articles. Return to Text
- E.P. Royappa v. State of Tamil Nadu, (l974) 4 SCC 3. Return to Text
- Cf. Prof. Willis, 'CONSTITUTIONAL LIMITATIONS' (Ist edn.) p. 579. "The guarantee of equal protection of laws means protection of equal laws. It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to be operated. It merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions both in privileges conferred and in the liability. Similarity and not identity of treatment is enough." Return to Text
- State of W.B. v. Anwar Ali Sarkar, AIR 1952 SC 75. Return to Text
- (a) State of Bombay v. F.N. Balsara, AIR 1951 SC 318. (b) R.K. Dalmia v. Justice Tendolkar, AIR 1958 SC 538. (c) In re Special Courts Bill, 1978, (1979) 1 SCC 380. Return to Text
- Chandrachud. C.J. in Special Courts Bill, 1978, Re, (1979) 1 SCC 380, 423 : "As far back as 1960 it was said by this Court in Kangsari Haldar that the proposition applicable to cases arising under Article 14 have been repeated so many# times that they now sound platitudinous. If it was so in 1960, it would be even more true in 1979." Return to Text
- LachmanDas v. State of Punjab, AIR 1963 SC 222. Subba Rao J.,:"The doctrine of classification is only a subsidiary rule evolved by courts to give content to the said doctrine (equality before law). Over-emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the article of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality: the fundamental right to equality before the law and equal protection of the laws may be replaced by the doctrine of classification." Return to Text
- K.K. Mathew : Democracy, Equality and Freedom, p. 63. Return to Text
- H.M. Seervai, Constitution Law of India, 3rd Edn. Vol. I, p.382, 9.114 (Commenting with reference to the power of exemption conferred by most of the statutes on the executive he has said "on this question the attitude of the Supreme Court is not consistent". Return to Text
- Cited in Mahendra P. Singh (Ed.): Comparative Constitutional Law, p. 485. Return to Text
- (1974) 2 SCC 402. Return to Text
- AIR 1967 SC 1581. Return to Text
- (1974) 4 SCC 3, 38. Return to Text
- Maneka Gandhi v. Union of India, (1978) 1 SCC 248; Ramana Dayaram Shetty v. Airport Authority, (1979) 3 SCC 489. Return to Text
- (1981) 1 SCC 722. Return to Text
- (1979) 3 SCC 489 at 511. Return to Text
- H.M. Seervai, former Advocate-General of Maharashtra (1957-1974) and Jagdish Swaroop, former Solicitor-General of

India, in their commentaries on the Constitution of India. Return to Text
- H.M. Seervai: Constitutional Law of India, 3rd Edn.,vol. I, p. 275 Return to Text
- Ibid., at p. 277. He has demonstrated the fallacy thus: All arbitrary actions are violative of equality. Some laws violate equality, Middle term "equality" remains undistributed in both the# aforesaid major and minor premises. Therefore, according to him, "if a conclusion were drawn namely, therefore some laws are arbitrary actions" it would be an inaccurate conclusion. Return to Text
- Jagdish Swaroop: Constitution of India vol. I para 10.6. Return to Text
- H.M. Seervai in 'CONSTITUTIONAL LAW OF INDIA' at p. 274, vol. I, 3rd Edn. "However, stripped of rhetoric, and the use of fashionable phrases like 'dynamic aspects' and 'activist magnitude' (whose appropriateness we need not stop to examine), it is claimed for the new doctrine that it explains, as the doctrinaire theory of classification does not, the scope of the right to equality. One of the risks which judges run by being 'dynamic' or 'active' is that at times their activity may carry them away from the truth and reality and this is precisely what has happened to Bhagwati, J. and his brother Judges in propounding the new theory. It is submitted that the old theory is the only doctrine which brings out the full scope of "the equal protection of law" guaranteed to every person by Article 14.... new doctrine is untenable...." Return to Text
- Lachman Das v. State of Bombay, AIR 1952 SC 239. Return to Text
- P.K. Tripathi, The Fiasco of Overruling, A.K. Gopalan and worse. Cited by Mahendra P. Singh in Comparative Constitutional Law at p. 480. Return to Text
- Km. Shrilekha Vidyarathi v. State of U.P., (1991) 1 SCC 212. "However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears ex facie,# arbitrary, the initial burden to prove the arbitrariness is discharged by shifting onus on the State to justify its action as fair and reasonable. If State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged." Removal en bloc of all District Government Counsel by State Government was held to be arbitrary as no common reason applicable to all of them justifying their termination in one stroke on a reasonable ground was shown. Return to Text
- Supreme Court Employees Welfare Association v. Union of India, (1989) 4 SCC 187; Kerala Hotel and Restaurant Assn. v. State of Kerala, (1990) 2 SCC 502. (The scope for classification permitted in taxation is greater and unless the classification made can be termed to be palpably arbitrary, it must be left to the legislative wisdom to choose the yardstick for classification, in the background of the fiscal policy of the State to promote economic equality as well.) Return to Text
- Sushma Gosain v. Union of India, (1989) 4 SCC 468. The widow of a store-keeper in the department of Director-General Border Road (DGBR) had applied after the death of her husband in 1982 for employment on compassionate ground, on the post of L.D.C. She had also passed the trade test but she was not given appointment and was told that her case was under consideration. Her application was, however, rejected in 1985 when a ban on appointment of ladies was imposed. The Supreme Court held that denial of appointment to her was 'patently' arbitrary and had to be set aside. Return to Text